23 So.2d 718
(Cite as: 156 Fla. 559, 23 So.2d 718)

C

Supreme Court of Florida, en Banc.

BEEBE et ux.
v.
RICHARDSON.

Nov. 16, 1945.

Suit by R. L. Beebe and his wife against E. J. Richardson for specific performance of realty sales contract. From an adverse decree, plaintiffs appeal.

Affirmed.

West Headnotes

[1] Statutes ⚿181(1)
361k181(1) Most Cited Cases

[1] Statutes ⚿183
361k183 Most Cited Cases

A statute should be so construed and applied as to give effect to the evident legislative intent, even if result seems contradictory to rules of construction and the strict letter of the statute.

[2] Statutes ⚿184
361k184 Most Cited Cases

In construing a statute, the legislative intent should be gleaned from the language of statute, the subject sought to be regulated, the purpose to be accomplished, and the means adopted for accomplishing the purpose.

[3] Statutes ⚿184
361k184 Most Cited Cases

[3] Statutes ⚿189
361k189 Most Cited Cases

[3] Statutes ⚿190
361k190 Most Cited Cases

Where there is ambiguity in meaning to be given the words employed in a statute, or where context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to legislative purpose.

[4] Taxation ⚿801
371k801 Most Cited Cases

The statute conferring upon "chancery courts" jurisdiction of actions to quiet tax titles against holders of record title intended to place such jurisdiction in circuit courts, the remedy, though statutory in nature, to be pursued in conformance with prescribed modes and methods of equity procedure and practice. F.S.A. § § 66.26, 66.27.

[5] Quieting Title ⚿28
318k28 Most Cited Cases

Jurisdiction to quiet title to lands is inherent in courts of equity.

[6] Courts ⚿42(7)
106k42(7) Most Cited Cases

The statute conferring upon "chancery courts" jurisdiction to quiet tax titles against holder of record title is not unconstitutional on the ground that only circuit courts have jurisdiction of equity cases, since the statute manifests intent to place jurisdiction in circuit courts in that there is no such tribunal as a "chancery court" in Florida. F.S.A. § § 66.26, 66.27; F.S.A.Const. art. 5, § 11.

*560 **718 Appeal from Circuit Court, Broward County; George W. Tedder, judge.

Saunders & Patterson, of Fort Lauderdale, for appellants.

Davis & Lockhart, of Fort Lauderdale, for appellee.

C. A. Hiaasen, of Fort Lauderdale, and Sydney J. Catts, Jr., of West Palm Beach, amici curiae.

SEBRING, Justice.

This is a suit for specific performance to require the defendant below to carry out his agreement to purchase real property, by accepting a deed to the property and paying the purchase price. The facts giving rise to the controversy will not be delineated, as the only real question on this appeal is whether chapter 21822, Laws of Florida, 1943, F.S.A., § 66.26 et seq., is unconstitutional and void for certain reasons urged by the defendant.

Section 1 of Chapter 21822, F.S.A. § 66.26, supra, provides, in part, that any grantee under any tax deed

issued by any municipality of the State of Florida, or any successor in title to such grantee, or any purchaser from any such municipality, of any land the title to which has been acquired by such municipality through any manner of proceeding or foreclosure for the nonpayment of taxes or special assessments, or the successor in title to *561 any such purchaser, may maintain a suit in the chancery courts of this State for the purpose of quieting the title to the lands included in such tax deed, or so purchased from such municipality, against the holders of the record title to said lands, and against any other person or corporation claiming any interest in said lands or any lien or encumbrance thereon, prior to the issuance of any such tax deed or prior to the loss of title to said lands in any such tax proceeding or foreclosure.

Section 2 of Chapter 21822, F.S.A. § 66.27, supra, prescribes that the practice and procedure and methods of serving process in suits brought under the act shall be as prescribed by the laws of this State for other suits to quiet title. The section authorizes a plaintiff to maintain suit whether in or out of possession of the lands involved, but provides that where the defendant is in actual possession thereof a jury trial may be had as in other suits to quiet title. Where the suit is based upon a tax **719 deed, the plaintiff is not required to deraign his title beyond the issuance of the tax deed. Where the suit is based upon a conveyance by a municipality of the State of land the title to which it has acquired through a foreclosure or other proceeding for the nonpayment of taxes, the bill of complaint need not deraign title beyond the deed or other instrument or act vesting title in the municipality.

It is asserted by the appellant that the statute is unconstitutional and void in that it is violative of section 11 of Article V of the Constitution of Florida which provides that 'The Circuit Courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts * * * and of such other matters as the Legislature may provide.' The gist of the appellants' argument centers upon the attempt of the legislature to confer upon 'the chancery courts' of the State, as distinguished from 'the circuit courts,' the power, by statute, to quiet titles to land based upon tax deeds in the hands of a tax deed grantee or his successor in interest. The appellants maintain that the equity jurisdiction of the circuit courts of the state is a constitutional jurisdiction, not a legislative jurisdiction, and may not be enlarged by statute.

[1][2][3] *562 It is a familiar rule of statutory construction that a statute should be so construed and applied as to give effect to the evident legislative intent, even if the result seems contradictory to rules of construction and the strict letter of the statute. Payne v. Payne, 82 Fla. 219, 89 So. 538; Geizen v. Sumter County, 89 Fla. 45, 103 So. 104. In construing a statute, the legislative intent should be gleaned from the language of the statute, the subject sought to be regulated, the purpose to be accomplished, and the means adopted for accomplishing the purpose. State v. Rose, 93 Fla. 1018, 114 So. 373; State v. Sullivan, 95 Fla. 191, 116 So. 255. Where there is ambiguity and uncertainty in the meaning to be given the words employed in a statute, or where the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated. State v. Beardsley, 84 Fla. 109, 94 So. 660; City of West Palm Beach v. Amos, 100 Fla. 891, 130 So. 710; State v. City of Miami, 101 Fla. 292, 134 So. 608.

[4] Strictly speaking, there is no such tribunal in the judicial system of Florida as a 'chancery court,' though the circuit court of the state, when exercising its equity jurisdiction under the constitution, is frequently spoken of as a chancery court. In attempting to confer jurisdiction upon the 'chancery court' of the state to quiet tax titles to real estate, we think it manifestly plain that it was the legislative purpose to place such jurisdiction in the circuit court, the remedy, though statutory in nature, to be pursued in conformance with prescribed modes and methods of equity procedure and practice.

[5][6] Jurisdiction over proceedings to quiet title to lands is inherent in courts of equity; and though we have said in past decisions that there is no such proceeding known to the general equity law of this state as a suit to quiet a tax title, Brecht v. Bur-Ne Co., 91 Fla. 345, 108 So. 173; Stuart v. Stephanus, et al., 94 Fla. 1087, 114 Fla. 767; Cremin v. Quigley, et al., 104 Fla. 133, 139 So. 383; Day v. Benesh, et ux., 104 Fla. 58, 139 So. 448, we have never held that it was not permissible for the legislature, in the legitimate exercise of its legislative power and discretion, to provide such remedy. This *563 the legislature may do, and has now done by the enactment of chapter 21822, supra; and we think that as against the constitutional ground urged by the appellants, the statute is valid.

By means of this statute, the legislature has now enlarged the field in which the circuit court, in the exercise of its equity jurisdiction to quiet titles, may

operate. Through the statute the holder of a tax title, and his successors in interest, are given a remedy, which, when properly pursued, will set at rest potential claims of the former owner and lien holders that may arise to harass the new title. Under the statute all persons claiming an interest in the land involved by reason of the former record title are given an opportunity to come into the suit and present defenses in opposition to the establishment and confirmation of the tax title. When they have had their day in court, an adjudication against them estops them thereafter from questioning the validity of the tax title or the antecedent proceedings upon which it is based. Such procedure enables the holder of the tax deed and his successors in interest to bar and foreclose the interest of the original owner of the land, and lien holders, thereby stabilizing **720 tax titles and enhancing the market value of the new found title to the property.

Other grounds of appeal have been duly considered and are found to be without merit.

The decree appealed from is affirmed.

It is so ordered.

CHAPMAN, C. J., and TERRELL, BROWN, BUFORD, THOMAS, and ADAMS, JJ., concur.

23 So.2d 718, 156 Fla. 559

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Supreme Court of Florida.

WAKULLA COUNTY, Appellant,
v.
Clifford L. DAVIS, and Philip J. Padovano, Appellees.

No. 58421.

March 5, 1981.

Appeal was taken from the Circuit Court, Wakulla County, Kenneth E. Cooksey, J., which awarded appointed counsel the requested compensation, construed section governing compensation for appointed counsel to allow "stacking" of statutory fee maximums, and found statute unconstitutional on its face and as applied to appointed attorneys. The Supreme Court, Adkins, J., held that: (1) section governing compensation for appointed counsel allows "stacking" of statutory fee maximums in cases involving multiple counts, in that such construction preserves and promotes legislative goal of protecting county treasuries and providing guidelines for courts without impairing section of statute requiring reasonable compensation for court-appointed attorneys, and such construction leads to more reasonable, sensible results, and (2) having determined that section governing compensation for appointed counsel allows "stacking" of statutory fee maximums, determination of constitutionality of such section was unnecessary.

Affirmed in part and reversed in part.

West Headnotes

[1] Statutes ⚿223.1
361k223.1 Most Cited Cases

Law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time.

[2] Attorney and Client ⚿132
45k132 Most Cited Cases

In establishing limits on fees which can be paid court-appointed attorneys per case per defendant in section governing compensation for appointed counsel, legislature clearly intended to limit burden which such representation places on public treasuries and to provide guidelines for courts to follow. West's F.S.A. § 925.036.

[3] Statutes ⚿181(2)
361k181(2) Most Cited Cases

When meaning of the statute is at all doubtful, law favors a rational, sensible construction; courts are to avoid an interpretation of a statute which would produce unreasonable consequences.

[4] Attorney and Client ⚿132
45k132 Most Cited Cases

Section governing compensation for appointed counsel allows "stacking" of statutory fee maximums in cases involving multiple counts, in that such construction preserves and promotes legislative goal of protecting county treasuries and providing guidelines for courts without impairing section of statute requiring reasonable compensation for court-appointed attorneys, and such construction leads to more reasonable, sensible results. West's F.S.A. § § 925.035, 925.036.

[5] Constitutional Law ⚿46(1)
92k46(1) Most Cited Cases

Having construed section governing compensation for appointed counsel to permit "stacking" of statutory fee maximums in cases involving multiple counts, determination of constitutionality of such section was not required. West's F.S.A. § 925.036.

*540 Ronald L. Baker, County Atty. and Joseph S. Geller, Crawfordville, for appellant.

Clifford Davis and Philip J. Padovano, in pro. per.

Michael Egan of Roberts & Egan, for State Ass'n of County Com'rs of Florida, Inc., Tallahassee, amicus curiae.

Steven L. Seliger of Gen. Counsel, Quincy, for Florida Clearinghouse on Criminal Justice, Inc., amicus curiae.

Howard B. Eisenberg, Richard J. Wilson, Malcolm Young and Jack I. Schmerling, Washington, D. C., Nat. Legal Aid and Defender Ass'n, amicus curiae.

*541 H. Clyde Hobby of McClain & Hobby, for Pasco County Bar Ass'n, Dade City, amicus curiae.

ADKINS, Justice.

This is an appeal from an order entered by the Circuit Court of Wakulla County specifically passing upon the constitutionality of section 925.036, Florida Statutes (Supp.1978). We have jurisdiction. Art. V, s 3(b)(1), Fla.Const.

Appellees Clifford Davis and Philip Padovano were appointed Special Assistant Public Defenders to represent Johnny Copeland and Frank Smith, respectively. Both defendants were charged with first-degree murder, robbery with a firearm, kidnapping and involuntary sexual battery. Following the convictions of Copeland and Smith, each appellee filed a motion for costs and attorneys fees; Davis requesting $5,891.84, and Padovano requesting $7,372.00. Fees were computed by applying court-adopted hourly compensation rates to the time spent on the cases. Appellant Wakulla County opposed the award of fees computed in this manner to the extent that the fees exceeded the $2,500 cap allegedly imposed by section 925.036, Florida Statutes, for capital cases represented at the trial level. Appellee Padovano asserted that the maximum fees payable to appointed counsel under section 925.036 can be "stacked" in cases involving multiple counts; yielding an $8,500 maximum in his case (three life felonies at $2,000 each plus one capital case at $2,500). Appellee Davis adopted this "stacking" theory and alternatively asserted that section 925.036 is unconstitutional as applied in his situation and on its face. In its order of compensation the Circuit Court of the Second Judicial Circuit in and for Wakulla County awarded the appellees the requested compensation and construed section 925.036 to allow "stacking" of the statutory fee maximums. Additionally, the court found the statute unconstitutional on its face and as applied to the appellees.

In interpreting section 925.036, Florida Statutes, to allow stacking, the trial court stated:

> It is expressly interpreted by this Court that when the State elects to file more than one count in an indictment or information the Statute provides for a cumulative maximum fee comprised of the sum of the maximum fees for each count. To interpret otherwise could lead to an unfair result of an attorney having to represent a client on numerous cases within one proceeding and only be entitled to a maximum mandated by the most serious crime charged.

For the reasons set forth below, we affirm those parts of the trial court's decision holding that the fee limits of section 925.036, Florida Statutes, may be stacked and awarding the appellees the requested compensation.

Section 925.036, Florida Statutes, provides as follows:

> Appointed counsel; compensation. An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the court. The compensation for representation shall not exceed the following per case per defendant:
> (1) For misdemeanors and juveniles represented at the trial level: $500.
> (2) For noncapital, nonlife felonies represented at the trial level: $1,500.
> (3) For life felonies represented at the trial level: $2,000.
> (4) For capital cases represented at the trial level: $2,500.
> (5) For representation on appeal: $1,000.

(1)(2) The statute itself does not indicate whether stacking is to be allowed. It simply provides that compensation for representation in various types of cases is not to exceed the limits established "per case per defendant." The wording of the statute "542 leaves it open to either of two interpretations; that "per case" allows the attorney compensation for each charged offense on which he represented the defendant, or, that "per case" limits the attorney to the maximum fee allowed for the most serious charge on which he defended his client, regardless of the number of offenses joined for trial. Because of this ambiguity, we must apply the rules of statutory construction to determine whether fees may be stacked. "In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction." State v. Sullivan, 95 Fla. 191, 207, 116 So. 255, 261 (1928). In determining our pole star, legislative intent, we are not to analyze the statute in question by itself, as if in a vacuum; we must also account for other variables. Thus, it is an accepted maxim of statutory construction that a law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not

enacted at the same time. Garner v. Ward, 251 So.2d 252 (Fla.1971). We have in this case, another section within the same statute which must be harmonized with section 925.036, Florida Statutes.

Section 925.035, Florida Statutes (1977), provides:

> If the court determines that the defendant in a capital case is insolvent and desires counsel, it shall appoint an attorney to represent the defendant. If the court appoints an attorney other than the public defender, the attorney shall be allowed reasonable compensation for representing the defendant, as determined by the court.

(Emphasis supplied.) The potential for conflict between the two sections is evident. One sets limits on the fees which may be awarded, while the other requires reasonable compensation. In establishing limits on the fees which can be paid court-appointed attorneys per case per defendant, the legislature clearly intended to limit the burden which such representation places on public treasuries and to provide guidelines for courts to follow. Conceivably, in the absence of any kind of limitation on fees, a small county with limited resources could be placed in serious financial difficulties. Section 925.036, Florida Statutes, was intended to decrease the likelihood of such an occurrence.

Section 925.035, Florida Statutes, on the other hand, seeks to insure that counsel is made available to those charged with a capital offense who otherwise could not afford to hire an attorney and that the attorney appointed is reasonably compensated for his services. The conflict between sections 925.035 and 925.036 arises when "reasonable compensation" exceeds the limits imposed by section 925.036.

If chapter 925, Florida Statutes, is construed to prohibit stacking of fees and the appellees here are limited to a fee not to exceed $2,500, neither will receive the "reasonable compensation" required by section 925.035, Florida Statutes, for their services as court-appointed counsel. Thus, such an interpretation conflicts with the provisions of section 925.035. Alternatively, section 925.036 may be interpreted to allow stacking. If it is so construed, the appellees can be awarded the amount established by the trial court as reasonable compensation for their services, and yet still be within the limits of section 925.036. There would be no conflict with the provisions of any section of the statute.

Clearly, given the choice, the proper interpretation of this statute is the one permitting stacking. "(C)ourts, in construing a statute, must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field." Howarth v. City of DeLand, 117 Fla. 692, 701, 158 So. 294, 298 (1934). "(W)here two statutes operate on the same subject without positive inconsistency or repugnancy, courts must construe them so as to preserve the force of both without destroying their evident intent, if possible." *543Mann v. Goodyear Tire and Rubber Company, 300 So.2d 666, 668 (Fla.1974). By construing chapter 925 to allow stacking, a potential conflict between two sections thereof will be avoided and any inconsistency will be resolved. Any other construction would exacerbate the problem, and be improper.

(3) An interpretation allowing stacking is also compelled by the rule of statutory construction which provides that when the meaning of a statute is at all doubtful, the law favors a rational, sensible construction. Realty Bond & Share Co. v. Englar, 104 Fla. 329, 143 So. 152 (1932). Courts are to avoid an interpretation of a statute which would produce unreasonable consequences. Id.

If stacking is not permitted, the result could be quite unfair and unreasonable to the court-appointed attorney. He might be forced to defend a client on multiple non-life felonies, and life felonies joined with a capital case, spend a large amount of time thereon, and still be limited to $2,500 in compensation for his services, as in this case. It is illogical to construe the law so that regardless of the number of charges on which a client is defended, his attorney is limited to a $2,500 fee. It is also illogical to construe the law in such a manner as to completely nullify the $2,000 maximum for life felonies simply because that offense is joined in the same prosecution with a separately punishable capital felony. Such is the case here. It would be much more reasonable and just to allow the attorney to stack the maximums for each offense for which his client was tried. Under that interpretation, the attorney would be more realistically and fairly compensated for the time spent on the case, and less likely forced to accept what might often turn out to be unfair compensation for his representation. At the same time, such an interpretation would still provide counties protection from exorbitant, limitless legal fees. Guidelines and maximums would not be abolished; they would simply be more realistic and equitable.

(4) Given the differing interpretations of chapter 925, the proper one is that which allows stacking. It is the only construction which preserves and promotes the legislative goal of protecting county

treasuries and providing guidelines for courts without impairing the section of the statute requiring reasonable compensation for court-appointed attorneys. It leads to more reasonable, sensible results. It is proper under the rules of statutory construction. For those reasons, we affirm that part of the circuit court's decision holding that the fee limits of section 925.036, Florida Statutes, may be stacked and awarding the appellees the requested compensation.

The court in Dade County v. Goldstein, 384 So.2d 183, 188-89 (Fla.3d DCA 1980), interpreted section 925.036, Florida Statutes (1979), as follows:

> By its plain terms, this statute provides that an attorney appointed under Section 27.53, Florida Statutes (1979), shall be compensated exclusively at an hourly rate to be fixed by the chief judge or the senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit. As such, the trial court by implication must find, based on a proper showing, that the appointed attorney reasonably expended a certain amount of hours in representing the indigent client, and, thereafter, compute the fee due based on the above established hourly rate. The statute provides no other method by which a fee may be computed, as for instance, taking into consideration the nature of the services rendered, the responsibility incurred, the skill required, the circumstances under which it was rendered, the value of the services to the client, and the beneficial results, if any, of the services. See Pfohl v. Pfohl, 345 So.2d 371, 379 (Fla.3d DCA 1977). Under the above statute, the exclusive method of compensating counsel is computed solely on the above hourly basis.
>
> Regardless of the reasonable number of hours expended by counsel, the above statute further provides that in no event shall the fee award exceed the following maximum amounts per defendant per case, to wit: $2,500 per capital felony case, $2,000 per life felony case, $1,500 *544 per noncapital, nonlife felony case, $500 per misdemeanor case. In our view, a case as so used by the statute must be considered a count charging an alleged crime in an indictment or information as applied to an adult criminal trial. Any other interpretation makes little sense. for example, when we deal with a multi-count indictment or information charging various types of felonies (which may include capital, life, and first, second or third degree felonies), as well as misdemeanors, one can only logically categorize each count as a capital case, a life felony case, a noncapital, nonlife felony case, and a misdemeanor case depending on the crime charged therein. We reject Dade County's contention that a case should be construed as an indictment or information no matter how many or what kinds of counts or charges are contained therein, because it would be logically impossible to determine thereafter what type of case it was as each count may charge, as here, significantly different crimes. The only logical way of interpreting the statute, in our view, is to consider each count as a separate case and categorize the case according to the crime charged in the count. Moreover, it makes no sense and is patently unfair to compensate an attorney who represents an insolvent defendant on a one-count indictment or information on the same basis as an attorney who represents an insolvent defendant on a multi-count indictment or information; the amount of work expended in defense of the two types of indictments or informations is frequently different as the multi-count indictment or information necessarily exposes the defendant to a much greater criminal liability. In short, any other construction of the statute, other than the one we reach herein, would yield an illogical and unreasonable result which we are constrained by law to avoid. Thomas v. State, 317 So.2d 450 (Fla.3d DCA 1975).

We approve this reasoning.

(5) Having resolved the matter on that basis, we need not, and do not, rule on the constitutionality of the statute. Williston Highlands Development Corp. v. Hogue, 277 So.2d 260 (Fla.1973). Likewise, the circuit court's ruling on the constitutionality of the statute was unnecessary. Accordingly, those portions of its order of compensation finding section 925.036, Florida Statutes, unconstitutional as applied and on its face are reversed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

ENGLAND, J., concurs in result only.

395 So.2d 540

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(Cite as: 660 So.2d 1124)

C

District Court of Appeal of Florida,
First District.

STATE of Florida, DEPARTMENT OF REVENUE,
Appellant,
v.
KEMPER INVESTORS LIFE INSURANCE
COMPANY, an Illinois Corporation, Appellee.

No. 94-1355.

Sept. 5, 1995.

Taxpayer filed complaint contesting legality of tax assessment and denial of tax credit. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., granted in part and denied in part taxpayer's motion for summary judgment. Department of Revenue appealed and taxpayer cross-appealed. The District Court of Appeal, Smith, Senior Judge, held that: (1) underpayment of income and emergency excise taxes was offset dollar for dollar by corresponding increase in payment of insurance premium taxes, and (2) Department was not authorized to create tax deficiency and levy assessment based upon partial audit.

Affirmed in part and reversed in part.

West Headnotes

[1] Taxation ⇐387
371k387 Most Cited Cases

Corporate taxpayer was entitled to dollar-for-dollar offset against underpayment of corporate income and emergency excise taxes for corresponding increase in payment of taxpayer's insurance premium taxes during same years, pursuant to credit provision of insurance premium tax statute, though underpayments were discovered in subsequent tax years. West's F.S.A. § 624.509(4).

[2] Statutes ⇐188
361k188 Most Cited Cases

Effect must be given to "plain language" of statutes.

[3] Statutes ⇐245
361k245 Most Cited Cases

Taxation statutes are construed in favor of taxpayer.

[4] Statutes ⇐245
361k245 Most Cited Cases

[4] Taxation ⇐204(2)
371k204(2) Most Cited Cases

Tax exemption and tax credit statutes are strictly construed against taxpayer and in favor of taxing authority.

[5] Statutes ⇐181(1)
361k181(1) Most Cited Cases

[5] Statutes ⇐183
361k183 Most Cited Cases

Legislative intent must be polestar which guides courts in construing statutes, and this intent must be given effect even if it may contradict strict letter of statute.

[6] Statutes ⇐181(2)
361k181(2) Most Cited Cases

Construction of statutes that would lead to absurd or unreasonable result or render statute purposeless should be avoided.

[7] Statutes ⇐181(1)
361k181(1) Most Cited Cases

[7] Statutes ⇐189
361k189 Most Cited Cases

When construing statutes, legislative intent must be given effect even when it may appear to contradict settled rules of construction; primary purpose designated should determine force and effect of words used, and no literal interpretation should be given that leads to unreasonable ridiculous conclusion or purpose not intended by legislature.

[8] Taxation ⇐387
371k387 Most Cited Cases

Purpose of statute calculating insurance premium taxes in conjunction with corporate income and emergency excise taxes is that to extent insurance corporation pays corporate income and emergency excise taxes it is not required to pay insurance premium taxes. West's F.S.A. § 624.509(4).

[9] Taxation 387
371k387 Most Cited Cases

Words "in which" in credit provision of insurance premium tax statute, providing for offset for corporate income and emergency excise taxes for year "in which" such tax payments were made, should be interpreted and applied as referring to year in which tax-paying events occur, according time scheduled for their occurrence in ordinary course of events, rather than as purporting to deal with carry-back or carry-forward issues. West's F.S.A. § 624.509(4).

[10] Taxation 387
371k387 Most Cited Cases

Department of Revenue was not authorized to create tax deficiency and levy assessment based upon piecemeal audit of taxpayer's corporate income and emergency excise taxes without audit of alternative and interrelated insurance premium tax returns. West's F.S.A. § § 213.34(4), 624.509(4).

[11] Taxation 310
371k310 Most Cited Cases

Amendments authorizing Department of Revenue to audit taxpayers and placing responsibility upon state, through its departments and officials, correctly and timely to determine tax burden falling upon taxpayer, over and above its responsibilities in merely responding to claims for refund, amounted to remedial legislation that applied retroactively. West's F.S.A. § § 213.34(4), 215.26.

*1125 Robert A. Butterworth, Attorney General, and Jeffrey M. Dikman, Assistant Attorney General, Tallahassee, for Appellant.

Robert T. Hyde, Jr., of Rogers Towers Bailey Jones & Gay, Jacksonville, for Appellee.

SMITH, Senior Judge.

The Department of Revenue (the Department, or DOR) appeals from that portion of a final summary judgment entered in favor of Kemper Investors Life Insurance Company (Kemper) finding that Kemper was entitled to a tax refund. Kemper, in turn, cross-appeals that portion of the final judgment ruling that it was not entitled to a refund of its payment of interest on an earlier assessed tax deficiency. For the following reasons, we affirm on appeal but reverse on the cross-appeal.

The undisputed facts show that on May 4, 1992, Kemper filed its original complaint pursuant to section 72.011, Florida Statutes (1991), contesting the legality of a tax assessment and concurrent denial of tax credit by the Department. The Department's assessments related to Kemper's underpayment of chapter 220 corporate income taxes and chapter 221 emergency excise taxes, which was discovered during a 1991 audit conducted by the Department of Kemper's calendar income tax years 1984-1988. The Department agreed that the underpayment resulted from a good faith error, and no penalties were assessed. Kemper did not challenge the correctness of the assessment insofar as it found an underpayment of chapter 220 and 221 taxes. However, Kemper opposed the assessment on the theory that it had overpaid chapter 624 insurance premium taxes, contending that the additional corporate income and emergency excise taxes owed for the tax years 1984-1987 pursuant to the audit should be considered offset by Kemper's payment of the identical amounts as insurance premium taxes for the corresponding years 1985-1988 pursuant to section 624.509(4), Florida Statutes (1991).

The Department moved to dismiss the original complaint for lack of jurisdiction and for failure to state a cause of action, asserting *1126 that because the underlying audit adjustments were uncontested, the assessment must be paid as an uncontested sum pursuant to section 72.011(3)(a), Florida Statutes. The Department argued before the trial court that unless Kemper complied with the statutory procedures for claiming a refund, Kemper had no standing and the court was without jurisdiction to rule on the challenge to the assessment. As to the alleged insurance premium tax overpayment, which Kemper sought to offset against the deficiencies revealed by the audit, the Department asserted that any refund application would first require the timely filing of a refund claim.

After a hearing, the trial court on September 14, 1992 entered an interlocutory order abating the action and allowing Kemper to file a tax refund claim within 30 days of the court's order. The order further provided that upon Kemper's failure to file its claim, the cause of action would stand dismissed. The Department was ordered to make an expedited determination on the refund claim, and Kemper was allowed 20 days from receipt of a refund denial

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notification to amend its complaint and contest the denial of the refund claim.

In accordance with the court's order, to avoid dismissal of its action, Kemper filed its insurance premium tax refund claim on October 6, 1992. On the same date Kemper paid the assessed corporate income and emergency excise taxes, in the amount of $255,666, as well as interest in the amount of $173,646.44.

When the Department ultimately denied the refund claim, Kemper filed an amended complaint and the parties later filed cross motions for summary judgment, and a stipulation as to the facts to be considered by the court in ruling on the summary judgment motions. The court thereafter entered a summary final judgment on March 29, 1994, granting Kemper's motion for summary judgment in part and denying it in part. In granting the motion in part, the court found Kemper was entitled to the claimed tax credit against its 1985-1988 insurance premium taxes, including the $255,666 paid on October 6, 1992. The court specifically found that Kemper had overpaid its insurance premium taxes for the years 1985-1988 in the sum of $255,666. However, the court also ruled that Kemper was not entitled to a refund of the $173,646.44 interest payment.

[1] The Department frames the issue on appeal in accord with its arguments which were rejected by the court below. Here, as below, DOR asserts that the issue on appeal is whether Kemper's October 6, 1992, payment of corporate income and emergency excise taxes gave rise to a credit within the contemplation of section 624.509(4), Florida Statutes (1991), to be applied retroactively against Kemper's insurance premium taxes paid for the corresponding tax years 1985-1988. Kemper's arguments, on the other hand, in essence raise the question whether the audit and assessment in 1991 can lawfully support the collection of additional tax monies from Kemper when it is undisputed that the deficiency in payment of chapter 220 and 221 taxes was offset dollar for dollar by a corresponding increase in payment of Kemper's insurance premium taxes during the appropriate years.

Section 624.509(4) provides in relevant part as follows:

> The ... income tax imposed under chapter 220, and the emergency excise tax imposed under chapter 221, which are paid by any insurer shall be credited against, and to the extent thereof shall discharge, the liability for tax imposed by this section *for the annual period in which such tax payments are made.*

(Emphasis added.) The Department argues that the language of section 624.509(4) is plain and unambiguous, and as applied to the undisputed facts of the instant case, means that Kemper could only take the credit for the payment of additional corporate income and emergency excise taxes in 1992, the year "in which" the additional taxes were paid pursuant to the trial court's order. Thus, the Department reasons, Kemper was not entitled to "carry back" the credit to its 1985-1988 insurance premium tax years so as to generate a refund claim. In ruling as it did, DOR maintains, the trial court erred by not giving effect to the plain language of the statute, citing *State v. Egan*, 287 So.2d 1 (Fla.1973).

*1127 In order to fully appreciate the consequences to the taxpayer of the Department's position in this case, it is necessary to examine certain stipulated facts in more detail. Kemper filed corporate income and emergency excise returns and paid the taxes shown due by these returns for the years 1984-1987, inclusive. Kemper also filed its insurance premium tax returns for the years 1985-1988, inclusive, and paid the taxes shown due by these returns, after taking credit under section 624.509 for the corporate income and emergency excise taxes due for the years above stated. The stipulation of facts filed below by the parties contains a year-by-year breakdown of the amount of each tax paid for the years 1984-1988. The total amount of these payments, in the aggregate, is $991,561. If Kemper had paid the additional corporate income and excise taxes found due by the 1991 audit, in the years in which such taxes were due, Kemper's tax liability for the three taxes--corporate income, excise, and insurance premium--in the aggregate, would have been $991,561, which is the exact amount Kemper actually paid during the years in question. As a result of the trial court's order, entered at the insistence of the Department, Kemper on October 6, 1991 paid $255,666, representing the deficiency in corporate income and excise taxes revealed by the audit, and in addition, paid $173,646.44 as interest due on the tax deficiencies. Thus, Kemper paid $1,420,873.44 to the state, while the correct amount of Kemper's tax liability for the three taxes, in the aggregate, was the amount Kemper actually paid--$991,561.

The consequences of the Department's assessment can only be described as bizarre. One paragraph from DOR's initial brief candidly and succinctly sums up the facts we have outlined above:

> Looking at Chapter 220 & 221 taxes originally

paid for the calendar tax years ending 1984-1987, together with insurance premium tax paid for the calendar years ending 1985-1988 "in the aggregate", DOR would have received no greater combined tax payments if Kemper had originally paid the correct amount of Chapter 220 & 221 tax. (record cite omitted) This is because, for every additional dollar in Chapter 220 & 221 tax which would have been correctly paid, a dollar for dollar credit could have been taken, in that year of payment, against insurance premium tax.

Nevertheless, the Department asserts that the above facts are immaterial and irrelevant. [FN1] It argues, as it did below, that notwithstanding the state's receipt of the exact dollar amount it would have received from Kemper had Kemper's corporate income and excise tax returns been correct, the excess insurance premium tax paid by Kemper, which made up for the deficiency in the income and excise deficiencies, was not an "overpayment", but was in fact the "correct" amount. [FN2]

FN1. DOR also admits but dismisses as immaterial and irrelevant the fact that taking a credit against 1992 insurance premium taxes will not benefit Kemper in that, although Kemper's 1992 insurance premium tax return has not been audited by DOR, it appears from the face of the return that Kemper will not have sufficient premium tax liability to absorb the credit for the additional chapter 220 and 221 taxes assessed by DOR.

FN2. A logical extension of DOR's reasoning is that once insurance premium taxes are paid based upon an undercalculation of corporate income and emergency excise taxes, the premium tax remains forever paid, and is not subject to refund.

[2][3][4][5][6][7] The Department urges the application of familiar rules of statutory construction, reminding this court that effect must be given to the "plain language" of a statute; that taxation statutes are construed in favor of the taxpayer; and that tax exemption and tax credit statutes are strictly construed against the taxpayer and in favor of the taxing authority. We fully subscribe to these principles. We also are cognizant of the equally compelling and fundamental rule that legislative intent must be the polestar by which the court must be guided, and that this intent must be given effect even if it may contradict the strict letter of a statute; and that a construction of a statute that would lead to an absurd or unreasonable result or *1128 render a statute purposeless should be avoided. *State v. Webb*, 398 So.2d 820 (Fla.1981). The legislative intent must be given effect even when it may appear to contradict settled rules of construction; the primary purpose designated should determine the force and effect of the words used, and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or a purpose not intended by the legislature. *See, Smith v. Ryan*, 39 So.2d 281 (Fla.1949), and cases therein cited.

[8] The obvious legislative policy and intent behind the credit provision of section 624.509 is that to the extent an insurance corporation pays corporate income and emergency excise taxes it is not required to pay insurance premium taxes. To apply the literal language of the statute as appellant urges does not in any way further the legislative policy or intent, but instead produces consequences having no connection with the purposes of the statute. This is made evident in this case by the Department's attempt to carry forward the credit provision, with no express mandate to do so in connection with an audit and assessment, to a year having no relationship to the business, economic, or other activity of the taxpayer that generated the tax liability in the first instance. This factor alone distinguishes this case from authorities relied upon by the Department. In *National Brands Tire Co., Inc., v. Dept. of Revenue*, 383 So.2d 257 (Fla. 3d DCA 1980), a taxpayer was denied credit against sales tax which it attempted to take for tax paid on worthless accounts charged off for federal income tax purposes in prior years, where the statute provided that such credit could be taken only for accounts charged off for federal income tax purposes during the period covered by the current return. In *Estate of W.T. Grant v. Lewis*, 358 So.2d 76 (Fla. 1st DCA 1978), a taxpayer sought a refund of sales tax paid on accounts later determined to be worthless and charged off for federal income tax purposes. The refund was denied because the statute only provided for a credit against future taxes on future sales, and did not provide for a refund; and further, because the taxpayer went bankrupt there were no future sales or tax returns against which the previously paid taxes could apply. In *State Department of Revenue v. McCoy Motel, Inc.*, 302 So.2d 440 (Fla.1st DCA 1974), this court held that a taxpayer owed documentary stamps on the full

amount shown on the face of a promissory note secured by a "wrap around" mortgage, rather than the difference between that promissory note and an earlier note secured by the same mortgage, notwithstanding the fact that the taxpayer might have owed less tax if it had structured the transaction differently.

Significantly, none of the foregoing cases involve the overpayment or underpayment of off-setting taxes payable to the same taxing authority. In each case the taxpayer sought an advantage not contemplated by the language of the statutes or reasonably related to the purposes and policies for their enactment.

Of particular note is the observation of the court in *National Brands*, commenting that the taxpayer's view would allow it to claim the tax credit at any subsequent time, no matter how long afterward it might choose: "This reading of the statute would render its timing provisions meaningless and superfluous, and is therefore not an acceptable one." 383 So.2d at 259. In the case before us, the Department's view allows the tax credit provision to be shifted forward without any logical reason to justify it, only a literal interpretation of the words "in which." Thus, the Department's view would allow it to shift the credit forward to a year fortuitously dictated by the Department's auditing activity, which could occur in any one of the five or more years allotted to the Department within which to conduct an audit and levy an assessment. Section 95.091, Florida Statutes. The ability of the taxpayer to avail itself of the tax benefit intended by the Legislature would be controlled solely by whim or chance, and not based upon any reasoned application of the tax law. The incongruity of the Department's position is apparent when it is considered that while the Department has five or more years to audit and assess, the taxpayer has only three years within which to seek a refund. *1129Section 215.26, Florida Statutes. [FN3]

FN3. It is noted that the Department asserted the statute of limitations defense in its pleadings filed below. Discussion of this defense is noticeably absent from its briefs and argument in this court.

The Department's arguments suggest that the substantial forfeiture of money it attempts to impose on the taxpayer in these proceedings is simply the price to be paid by a taxpayer who files an incorrect return. However, we are of the view that the tax laws contain ample provisions for penalties and interest for taxpayer's errors and omissions, and it is not the province of the Department to create additional penalties and forfeitures for the taxpayer, or windfalls for the state.

[9] As we view the statute, and so, apparently, as did the trial judge, there is a logical and rational interpretation of section 624.509(4) that satisfies the obvious legislative intent, caused no loss of revenue for the state, creates no windfall for the state, and avoids an unintended forfeiture of funds for a taxpayer acting in good faith. That interpretation, which was advanced by Kemper below as well as on appeal, is that the statute prescribes a methodology for the year-by-year computation of the insurance premium tax, and does not purport to deal with credit carry-back or carry-forward issues. The words "in which", the meaning of which is the key to this controversy, should therefore be interpreted and applied as referring to the year in which the tax-paying events occur according the time scheduled for their occurrence in the ordinary course of events. There is simply no justification for the Department's attempt to read into the statute provisions dealing with the overpayment or underpayment of any of the three taxes mentioned, and its attempt to do so, in our judgment leads to an absurd and unreasonable result.

[10] One aspect of this case that has not been satisfactorily explained is the Department's "piecemeal" audit of Kemper's corporate income and emergency excise tax returns without an audit of the alternative and inter- related insurance premium tax returns. So far as we have determined, no statute, department rule, or ordinary accounting principles requires a partial audit such as occurred in this case. [FN4] In fact, such a procedure appears to be at odds with the legislation discussed below.

FN4. We have not overlooked DOR's reliance upon Opinion of the Attorney General, 82-67 (1982) which contains language appearing to support its interpretation of section 624.509(4). However, the opinion does not deal with facts analogous to those in the case before us and is therefore of limited assistance in resolving this case. DOR also relies upon *Financial Guaranty Insurance Company v. Dept. of Revenue*, 589 So.2d 295 (Fla. 1st DCA 1991). This case was a "Per Curiam, Affirmed", without opinion, and is therefore

of no precedential authority. *Department of Legal Affairs v. District Court of Appeal*, 434 So.2d 310 (Fla.1983). Moreover, both the Attorney General's Opinion and the Financial Guaranty decision predated the legislative changes discussed in this opinion.

The most recent expression of the Legislature in regard to the Department's audit and assessment procedures strongly undermines the Department's position in this case. Section 213.34(4), Florida Statutes (Supp.1992), provides as follows:

213.34 Authority to audit.

(4) Notwithstanding the provisions of s. 215.26, the department shall offset the overpayment of any tax during an audit period against a deficiency of any tax, penalty, or interest determined to be due during the same audit period.

As shown above, section 213.34 specifically states that the Department shall offset the overpayment of any tax during an audit period against a deficiency of any tax determined to be due during the same audit period. [FN5]

FN5. This 1992 amendment, enacted as a part of the "Taxpayer's Bill of Rights," became effective six days prior to Kemper's payment of October 6, 1992, and long before the final summary judgment was rendered. DOR argues that this provision was not in effect when the trial court ordered Kemper to file for a refund, and even if it had been in effect, it would not have changed the requirement for Kemper to take credit for its 1992 payment in 1992. In the final analysis, DOR offers no explanation as to the meaning or operation of this amendment.

[11] Here, although there was no audit of an alleged overpayment of insurance premium taxes in the audit period under review, *1130 we are of the view that this omission works against the Department, rather than against the taxpayer. By reference to section 215.26, the language of section 213.34(4) appears to place a responsibility upon the state, through its departments and officials, correctly and timely to determine the tax burden falling upon the taxpayer, over and above its responsibilities in merely responding to claims for a refund. We view these amendments as remedial legislation, and therefore applicable to the resolution of the case before us. *See, Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla.1994); *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239, 241-242 (Fla.1977).

Reading section 213.34(4) in *pari materia* with section 624.509(4) and the refund provisions to which section 213.34(4) refers, in the light of the principles stated and the arguments and contentions discussed above, leads us to conclude that the Department was not authorized to create a tax deficiency and levy an assessment upon Kemper based upon a partial audit of Kemper's chapters 220, 221, and 624 tax returns. Accordingly, we hold that the trial court correctly ordered a refund to Kemper of the sum of $255,666. While under our view the trial court should have simply voided the assessment of chapter 220 and 221 tax deficiencies in accordance with Kemper's initial pleading, we reach the same result as the trial court did and therefore affirm that portion of the judgment below ordering a refund to Kemper.

Kemper raises on cross-appeal the issue of whether the trial court erred in awarding the Department the interest paid by Kemper on October 6, 1992. In accord with our reasons for affirmance of the trial court's order for a refund as above stated we hold that it was error for the trial court to deny Kemper's claim for refund of the interest payment of $176,646.44. Since under our ruling there was no valid assessment for a deficiency, it follows that no interest was owed.

The judgment of the court below is AFFIRMED as to the issue on appeal; and the final judgment is REVERSED as to the issue on cross-appeal, and the cause is remanded for entry of an amended judgment consistent with this opinion.

ALLEN and DAVIS, JJ., concur.

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22 Fla. L. Weekly S42
(Cite as: 686 So.2d 1349)

H
Briefs and Other Related Documents

Supreme Court of Florida.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, Petitioner,
v.
FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS, et. al., Respondents.

No. 87233.

Jan. 16, 1997.

Parents filed petition for compensation for their child's birth-related neurological injury. The Division of Administrative Hearings (DOAH) granted petition, and Birth-Related Neurological Injury Compensation Association (NICA) appealed. The District Court of Appeal affirmed, but certified question, 664 So.2d 1016. The Supreme Court held that: (1) to obtain coverage under Birth-Related Neurological Injury Plan, infant must suffer both substantial mental and substantial physical impairment, and (2) parents' child met those requirements.

Approved in part, disapproved in part.

West Headnotes

[1] Health ⚿402
198Hk402 Most Cited Cases
(Formerly 299k1, 299k18.110 Physicians and Surgeons)

"And," as used in Birth Related Neurological Injury Compensation Plan (NICA) section which provides compensation for those who are "substantially mentally and physically impaired" as result of birth-related neurological injury, must be read in disjunctive, and cannot be replaced with word "or" and read in disjunctive; thus, in order to obtain coverage, infant must suffer both substantial mental and substantial physical impairments, and it is insufficient that infant suffer only substantial impairment, mental or physical. West's F.S.A. § 766.302(2).

[2] Statutes ⚿184
361k184 Most Cited Cases

[2] Statutes ⚿188
361k188 Most Cited Cases

[2] Statutes ⚿189
361k189 Most Cited Cases

Where legislature has not defined words used in phrase, language should usually given its plain and ordinary meaning; nevertheless, consideration must be accorded not only to literal and usual meaning of words, but also to their meaning and effect on objectives and purposes of statute's enactment.

[3] Statutes ⚿181(1)
361k181(1) Most Cited Cases

It is fundamental rule of statutory construction that legislative intent is polestar by which court must be guided in construing enactments of legislature.

[4] Health ⚿402
198Hk402 Most Cited Cases
(Formerly 299k1, 299k18.110 Physicians and Surgeons)

Because Birth Related Neurological Injury Compensation Plan (NICA) is statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms, and legal representative of infant should be free to pursue common law remedies for damages resulting in injury not encompassed within express provisions of Plan. West's F.S.A. § § 766.301-766.316.

[5] Health ⚿402
198Hk402 Most Cited Cases
(Formerly 299k1, 299k18.110 Physicians and Surgeons)

Infant was permanently and "substantially mentally and physically impaired" as result of "birth-related neurological injury," thus entitling him compensation under Birth Related Neurological Injury Compensation Plan (NICA), even though certain test results indicated that he was average or even above in his cognitive skills and preacademic skills; as result of birth-related events causing oxygen deprivation, infant suffered focal injury to basal ganglia, which aids body in performing "physical functions," and as direct result of his injury, he would not be able to

communicate, attend school or otherwise learn and develop intellectually without substantial accommodation. West's F.S.A. § 766.302(2).

*1350 Bruce Culpepper and William E. Whitney of Pennington, Culpepper, Moore, Wilkinson, Dunbar & Dunlap, P.A., Tallahassee; W. Douglas Moody, Jr. of Bateman Graham, Tallahassee; and David W. Black of Frank, Effman, Weinberg & Black, P.A., Plantation, for Petitioner.

Larry Sands of Sands, White & Sands, P.A., Daytona Beach, for Respondents.

PER CURIAM.

We have for review a decision passing upon the following question certified to be of great public importance:

> IN ORDER TO OBTAIN COVERAGE UNDER THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY PLAN AS PROVIDED IN SECTIONS 766.301-316, FLORIDA STATUTES, MUST AN INFANT SUFFER BOTH SUBSTANTIAL MENTAL AND SUBSTANTIAL PHYSICAL IMPAIRMENT, OR CAN THE DEFINITION BE CONSTRUED TO REQUIRE ONLY SUBSTANTIAL IMPAIRMENT, MENTAL AND/OR PHYSICAL?

Florida Birth Related Neurological v. Florida Div. of Admin. Hearings, 664 So.2d 1016, 1021 (Fla. 5th DCA 1995). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We approve the result of the district court's decision but not the reasoning thereof.

PROCEDURAL HISTORY

On July 19, 1991, Judith and Fred Birnie, as parents and natural guardians of their son, Eric Birnie, who was born on March 12, 1989, timely filed a petition for compensation for birth-related neurological injuries pursuant to the Florida Birth-Related Neurological Injury Compensation Plan, sections 766.301-766.316, Florida Statutes (1995). [FN1] Petitioner NICA, the Florida Birth-Related Neurological Injury Compensation Association, disputed the Birnies' claim for compensation based on its conclusion that Eric had not suffered an injury covered by section 766.302(2) because he was not "substantially mentally impaired." An administrative hearing subsequently was held to determine whether Eric's injury was covered under the Plan. [FN2] Rejecting as unduly narrow NICA's assertion that "mental impairment" should be equated with "cognitive functioning as measured by intelligence tests" for purposes of compensation under the NICA Plan, the hearing officer concluded that Eric "is permanently and substantially mentally and physically impaired and has suffered a 'birth-related neurological injury,' within the meaning of section 766.302(2), Florida Statutes."

FN1. Herein, the NICA statute, or the Plan.

FN2. Before the hearing, the parties agreed that the amount of compensation, if any, should be bifurcated from the issue of compensability. Consequently, no evidence was presented at the hearing on the issue of benefits.

*1351 NICA appealed the hearing officer's order granting the Birnies' petition for compensation under the Plan. The district court affirmed the order, finding that the stated legislative policy behind the Plan could not be given effect by requiring that an infant "suffer *both* substantial mental *and* substantial physical impairment." Thus, the Fifth District went beyond the hearing officer's reading of the statute and construed the definition of "birth-related neurological injury" to include those injuries which cause "permanent and substantial impairment, mental and/or physical." *Florida Birth Related*, 664 So.2d at 1021. However, recognizing "the possible impact of this decision on the fund and on pipeline cases," *id.*, the Fifth District stayed its mandate and certified to us the above question as one of great public importance.

FACTS

Eric Ryan Birnie was born to Judith and Fred Birnie on March 12, 1989, at Halifax Hospital in Daytona Beach. As a result of birth-related events causing oxygen deprivation, Eric suffered a focal injury to the basal ganglia, an area of the brain which aids the body in performing "physical functions." The physician delivering obstetrical services during the birth of Eric was a "participating physician" with the Florida Birth-Related Neurological Injury Compensation Plan.

In July, 1991, when Eric was two years and four months old, the Birnies filed a petition for compensation for a birth-related neurological injury which NICA contested based on its conclusion that

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Eric had not suffered an injury covered by section 766.302(2), Florida Statutes (1991), because he was not "substantially mentally impaired." An administrative hearing was held to determine whether Eric's injury was covered by the Plan.

After hearing the evidence, the hearing officer rendered his decision finding that Eric had suffered a birth-related neurological injury and granted the Birnies' petition for compensation under the Plan. He specifically found that during the delivery, Eric had suffered "perinatal asphyxia ... hypoxic ischemia encephalopathy," the loss of oxygen to the brain. Additional findings of fact were included in the final order, the relevant portions of which were quoted in the Fifth District's opinion as follows:

24. After Eric was discharged from the hospital, he was evaluated by Dr. James Nealis, a pediatric neurologist. Dr. Nealis first evaluated Eric on March 29, 1989. Under his direction, a number of tests and evaluations were conducted. A Genetics test did not reveal any abnormalities. Similarly, a urine metabolic screen and thyroid function study did not reveal any problems.

....

27. An examination of Eric on January 11, 1990, indicated that he was experiencing some developmental delay. He had poor control of his head and he could not sit alone.

28. Eric began a special program at Easter Seals at approximately 11 months of age. At the time, Eric's gross motor skills were evaluated at 4 months and his fine motor skills were thought to be 4 1/2 months. At 16 months of age, Eric's motor development was still at 4 months. He could not sit alone and could not crawl.

....

30. On August 1, 1990, Eric was evaluated at the Nemours Children's Clinic in Jacksonville, Florida. Dr. William R. Turk performed the evaluation. He noted that Eric's gross motor development was severely limited and concluded that Eric had a static but evolving encephalopathy.

....

32. Dr. Turk summarized his findings in a letter to Eric's pediatrician dated September 25, 1990. That letter indicates that Dr. Turk reviewed Eric's "sequential neuroradiologic studies" and concludes that Eric has "a static encephalopathy manifest[ed] by a dystonic quadriplegia" as the result of "an evolving but remote hypoxic ischemic insult."

*1352 ....

35. In his 35 month evaluation conducted by Easter Seals, it was noted that Eric was functioning at an age equivalent of 8 months in gross motor skills. Eric was approximately age equivalent in receptive language skills, but he was functioning at only 24 months in expressive language skills. Eric was also demonstrating significant delay in oral motor skills. He had limited tongue mobility and was unable to lateralize, raise or lower his tongue. He was only able to produce a small number of vowel and consonant sounds.

36. On February 10, 1993, the Volusia County School Board administered a number of tests to Eric in order to evaluate him for placement in their exceptional student program. At the time of the evaluation, Eric was not able to stand, his manual dexterity was limited and special effort and attention was necessary to understand his verbal communications. Because of Eric's profound physical handicaps, the tests were specially selected and administered. The test results indicated that Eric was average or even above in his cognitive skills and preacademic skills. As a result, the School Board anticipates that Eric will ultimately be educated in a mainstream classroom with nonhandicapped students of his own age group. He will, however, need special accommodations within the classroom to address his physical handicaps and limitations.

37. The evidence established that it is very difficult to accurately assess the intellectual ability of a young child, especially a severely handicapped child such as Eric. While it is impossible to determine whether Eric's intellectual test results would have been higher if he had not suffered an hypoxic insult at birth, it is likely that the limitations on his exploratory capabilities caused by his physical handicaps have impaired his intellectual development to some degree.

38. At the time of the hearing in this case, Eric was 4 1/2 years old. He was unable to stand up, walk or crawl. His only method of independent mobility was to roll over. The use of his hands and arms was very limited. He also had great difficulty talking and/or communicating and he must take long pauses to formulate a response to any inquiry.

39. Eric's brain dysfunction is permanent. Because Eric's speech is greatly impacted by his condition, it is virtually certain that he will always be severely limited in his verbal expression and other communication skills. While continued therapy may help him to communicate better and to become somewhat more mobile, he will almost certainly never be able to walk, feed, groom or toilet himself.

40. The evidence established that Eric's problems are the result of damage to the basal ganglia deep

inside his brain. Although it can not be determined conclusively, it is more likely than not that the "white matter" surrounding the basal ganglia have also been damaged to some degree which may impact his perceptual and processing abilities.

....

43. ... Eric sustained an injury to the brain caused by oxygen deprivation in the course of labor, delivery or resuscitation in the immediate post-delivery period. The injuries and disabilities which have been manifested by Eric since his birth are consistent with and have repeatedly been attributed to brain damage from loss of oxygen during labor and delivery.... Given the absence of any other identifiable factor, it is concluded that Eric's condition is attributable to birth asphyxia. This conclusion is accordant with the opinion of the neonatologist who treated Eric in the neonatal intensive care unit. He believes that Eric suffered fetal distress due to the partial abruption of the placenta during labor and delivery. He also believes that Eric suffered hypoxic encephalopathy as the result of the umbilical cord being wrapped around his neck.

44. Eric is indisputably permanently and substantially physically impaired. Respondent *1353 contends, however, that Eric and his parents are not entitled to compensation under the NICA Plan because he is not substantially mentally impaired. This issue is addressed in more detail in the Conclusions of Law below. As noted above, Eric's condition is the result of damage to his brain. As a direct result of his injury, Eric will not be able to communicate, attend school or otherwise learn and develop intellectually without substantial accommodation. His social and vocational development have unquestionably been significantly impaired.

Florida Birth Related, 664 So.2d at 1017-19.

The hearing officer also made the following conclusions of law pertinent to the issue of statutory construction before us here:

54. The evidence in this case established that Eric suffered an injury to the brain caused by oxygen deprivation during the course of labor, delivery or resuscitation in the immediate post-delivery period. The more difficult issue is whether Eric's injury falls within the scope of the statute. Eric is indisputably permanently and substantially physically impaired as a result of the damage to his brain. Respondent argues that Petitioners are not entitled to compensation under the NICA Plan because Eric tested within normal ranges on specially selected and administered intelligence tests. Based upon those test results and the observations of various witnesses who testified that Eric appears to have an intellectual ability in the normal range, Respondent contends that Eric is not substantially and permanently "mentally impaired" within the scope of the statute. [footnote 2]

FN[footnote 2:] Petitioners have suggested that the NICA Plan should be interpreted to cover any child who is permanently and substantially mentally impaired. In this regard, Petitioners point out that the statute purports to cover spinal cord damage resulting from mechanical injury even though the damage in such a case would be primarily physical. To the extent that Petitioners contend that the NICA Plan covers injuries that result in only physical or mental impairment, their interpretation is rejected. The Statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements. Thus, a deformity or loss of limb would not ordinarily be covered under the NICA Plan. [end footnote 2]

Essentially, Respondent argues that mental impairment should be equated with cognitive functioning as measured by intelligence tests and any child who tests within normal ranges on an intelligence test is not entitled to receive compensation under the NICA Plan irrespective of the special accommodations necessary to administer the tests and/or the social and vocational limitations on the child as a result of his injury. This interpretation is rejected as unduly narrow.

....

61. In sum, it is concluded that, as a direct result of his brain injury and consequent physical limitations, Eric will not be able to translate his cognitive capabilities into adequate learning in a normal manner. Moreover, as a direct consequence of his injuries, Eric's social and vocational development have been drastically impaired. Consequently, it is concluded that Eric is permanently and substantially mentally and physically impaired and that Eric has suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes. Accordingly, the subject claim is compensable under the NICA Plan. Sections 766.302(2), 766.309(2), and 766.31(1), Florida Statutes. This

interpretation furthers the legislative intent to provide compensation to a limited class of catastrophically injured infants on a no-fault basis to help alleviate the malpractice insurance crisis facing physicians practicing obstetrics.

ANALYSIS

[1] This case presents this Court with a straightforward question of statutory interpretation and construction. That is, should the word "and," as used in the phrase "substantially mentally and physically impaired" in section 766.302(2) be read in the conjunctive, "and" or must it be replaced with the word "or" and read in the disjunctive to remain consistent with the legislature's intent in enacting the NICA statute? Although certifying the question for our review, the Fifth District construed "the definition of 'birth-related neurological injury' to include those injuries which cause permanent and substantial impairment, mental and/or physical," *Florida Birth Related*, 664 So.2d at 1021, based upon its finding that the literal language of the statute was in conflict with "the stated legislative policy of the act." *Id.* at 1019.

The NICA Plan was established by the legislature "to provide compensation, on a no-fault basis, for a limited class of catastrophic [birth-related neurological] injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301(2), *see also* § 766.303(1). As the Birnies did here, the injured infant or his personal representative may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings (DOAH) within five years of the infant's birth. *See* § § 766.302(3), 766.303(2), 766.305(1), and 766.313. NICA, which administers the Plan, has "45 days from the date of service of a complete claim ... in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(3).

If NICA determines that the injury alleged in a claim is a compensable birth- related neurological injury, it may award compensation to the claimant, provided that the award is approved by the hearing officer to whom the claim has been assigned. § 766.305(6). If, on the other hand, NICA disputes the claim, as it did in this case, the dispute must be resolved by the assigned hearing officer in accordance with the provisions of Chapter 120, Florida Statutes (1995). § § 766.304, 766.307, 766.309, 766.31. Pertinent to the issue before us, the hearing officer must determine whether the infant's injury is compensable under the statute.

[2][3] Section 766.302(2) states:

> "Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

Where, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning. *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351 (Fla.1984). Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment. *See Florida State Racing Comm'n v. McLaughlin*, 102 So.2d 574 (Fla.1958). Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]." *State v. Webb*, 398 So.2d 820, 824 (Fla.1981).

[4] In *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKeuchan*, 668 So.2d 974 (Fla.1996), we approved the decision of the district court below wherein the district court explained,

> because the [NICA] Plan, like the Worker's Compensation Act, is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms.... [and] a legal representative of an infant should be free to pursue common law remedies for damages resulting in an injury not encompassed within the express provisions of the Plan.

Humana of Florida, Inc. v. McKeuchan, 652 So.2d 852, 859 (Fla. 2d DCA 1995)) (citation *1355 omitted); *see also Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla.1978); *Adventist Health System/Sunbelt v. Hegwood*, 569 So.2d 1295 (Fla. 5th DCA 1990) (stating that statutes designed to supersede or modify rights provided by common law must be strictly construed and will not displace common law remedies unless such an intent is expressly declared).

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In light of these well-settled rules of statutory construction, the Fifth District's conclusion that the word "and" in the phrase "permanently and substantially mentally and physically impaired," should not be read in the conjunctive--but instead replaced with the word "or" and read in the disjunctive--is inappropriate here. The instant case is clearly distinguishable from those cases upon which the Fifth District relies for the proposition that courts may construe the word "and" as the word "or" in statutes where legislative intent mandates it.

In *Winemiller v. Feddish*, 568 So.2d 483 (Fla. 4th DCA 1990), the appellant sustained injuries when the pedal of the bike she was riding hit a coral rock in the swale of appellee's property. The appellant subsequently filed a two- count complaint against the appellee. Count I of the complaint alleged common law negligence for failure to properly maintain the swale area, and Count II alleged a violation of a city ordinance which appellant alleged was negligence per se. *Id.* at 484. The city ordinance in question stated:

> The *placement and maintenance* of shrubbery, above-the-ground sprinkler systems, mailboxes, signs, tree trimmings, refuse, concrete blocks, coral rock, pyramid-shaped cement curbstones, or any other sharp-edged or pointed organic or non-organic or poisonous material which could cause a road or traffic hazard, or injury to pedestrians, on the swale area adjacent to the public right-of-way within the ten-foot area measured from the edge of the paved surface of the vehicular right-of-way is prohibited.

Winemiller, 568 So.2d at 484 (quoting Tamarac, Fla., Ordinances Art. I, § 23.2(c) (1990)). The appellee in *Winemiller* filed a motion for summary judgment on Count II and asserted that the ordinance in question did not apply to him since it was the previous owner who had placed the rocks in the swale, and not himself. Finding that the ordinance only prohibited the *placement and maintenance* of the rocks, not the *placement or maintenance*, the trial court entered summary judgment for the appellee. *Id.* On appeal, the Fourth District was faced with determining the proper construction of the city ordinance. The Fourth District concluded: "We agree with appellant that the obvious purpose of this ordinance is to prevent injuries to the travelling public. To exempt some hazards in the swales because they were not placed there by the current owners even though they continue to be maintained by the owners would thwart the purpose of the legislation. The construction advocated by appellee is thus unreasonable." *Id.*

Winemiller and the cases discussed therein all illustrate situations where the word "and" or "or" could not be read literally or given its ordinary meaning because to do so would lead to unreasonable, absurd results and thus defeat the legislature's intent. *Accord Holly v. Auld*, 450 So.2d 217 (Fla.1984). Unlike those cases, however, reading the word "and" as used in the phrase "permanently and substantially mentally and physically impaired," section 766.302(2), in the conjunctive does not lead to absurd results, nor does it undermine the legislative policy in enacting the NICA statute.

Quite to the contrary, reading the phrase as it is plainly written and construing the word "and" in the conjunctive is completely consistent with the legislature's intent to "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries," § 766.301(2), in an effort to stabilize and reduce malpractice insurance premiums for providers of obstetric services in Florida. *See* § 766.301(c). In fact, the hearing officer in this case specifically rejected the Fifth District's subsequent interpretation of the statute in its final order, noting: "To the extent that Petitioners contend that the *1356 NICA Plan covers injuries that result in only physical or mental impairment, their interpretation is rejected. The Statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." Further, as previously noted, the hearing officer made a factual determination that this case falls within the statute even when the statute is given its plain meaning.

CONCLUSION

[5] We are left with the hearing officer's finding--which is properly predicated on a reading of the statute in the conjunctive--that Eric Bernie is "permanently and substantially mentally and physically impaired and ... has suffered a 'birth-related neurological injury' within the meaning of section 766.302(2)." Having thoroughly reviewed the record and the hearing officer's final order, we conclude that it is supported by competent and substantial evidence. Consequently, we disapprove the opinion below to the extent that it misconstrues the plain language of the statute, but approve the result, and direct that the case be remanded to DOAH for a determination of the amount of compensation Eric is entitled to under the NICA Plan.

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It is so ordered.

OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

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Briefs and Other Related Documents (Back to top)

- 1996 WL 33416511 (Appellate Brief) Petitioner Florida Birth-Related Neurological Injury Compensation Association's Reply Brief (Apr. 17, 1996)

- 1996 WL 33416509 (Appellate Brief) Answer Brief of Respondents, Judith Birnie and Fred Birnie, Legal Guardians for Eric Ryan Birnie, and Individually. (Mar. 25, 1996)

- 1996 WL 33416510 (Appellate Brief) Petitioner Florida Birth-Related Neurological Injury Compensation Association's Initial Brief (Feb. 26, 1996)

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286 So.2d 552
(Cite as: 286 So.2d 552)

H

Supreme Court of Florida.

RINKER MATERIALS CORPORATION, a Florida corporation, Petitioner,
v.
CITY OF NORTH MIAMI, a Florida Municipal corporation, Respondent.

No. 43645.

Dec. 6, 1973.

After board of adjustment and city council had denied property owner a permit to construct a ready mix concrete batching plant on property in city's industrial zone, owner filed petition for writ of certiorari. The Dade County Circuit Court, George E. Schultz, J., denied the petition, and owner appealed. The District Court of Appeal, 273 So.2d 436, affirmed, and certiorari was granted. The Supreme Court held that where zoning ordinance permitted contractor's plants in industrial zone, owner had right to construct concrete batching plant.

Petition granted.

For opinion after remand see 288 So.2d 536.

West Headnotes

[1] Courts ⇐216
106k216 Most Cited Cases

Misapplication of established decisional rules of statutory construction is clear basis of conflict. F.S.A.Const. art. 5, § 3(b)(3).

[2] Municipal Corporations ⇐120
268k120 Most Cited Cases

Municipal ordinances are subject to same rules of construction as are state statutes.

[3] Municipal Corporations ⇐120
268k120 Most Cited Cases

Unless it is clear that omission was inadvertent, courts, generally, may not insert words or phrases in municipal ordinances in order to express intentions which do not appear and must give ordinance plain and ordinary meaning of words employed by legislative body.

[4] Municipal Corporations ⇐120
268k120 Most Cited Cases

Where words used in ordinance, when considered in their ordinary and grammatical sense, clearly express legislative intent, other rules of construction and interpretation are unnecessary and unwarranted.

[5] Zoning and Planning ⇐233
414k233 Most Cited Cases

Intent of city commission in enacting zoning ordinance is to be determined primarily from language of ordinance itself and not from conjecture aliunde.

[6] Zoning and Planning ⇐278.1
414k278.1 Most Cited Cases
(Formerly 414k278)

Under zoning ordinance which provided for industrial use and specifically authorized contractor's plants, property owner had right to construct concrete batching plant.

*553 Anne C. Booth of Booth & Booth, Tallahassee, and Toby Prince Brigham, Miami, for petitioner.

Arthur J. Wolfson and John G. Fletcher, Miami, for respondent.

PER CURIAM.

We review on certiorari the Third District's opinion of February 14, 1973, reported at 273 So.2d 436, rehearing denied March 13, 1973, which upheld the Dade Circuit Court's affirmance of the City's denial of a building permit to the petitioner upon its property in the City's industrial zone.

[1] Conflict appears from failure to follow established decisional rules of statutory construction in the consideration of the legislative intent applying to the law in question, contrary to the holdings which set forth such rules and are hereinafter footnoted. In failing to apply the plain and ordinary meaning and common usage of the language of the ordinance in determining intent, the district court misapplied the established decisional rules of statutory construction. Such misapplication is a clear basis of conflict.[FN1]

FN1. Nielsen v. City of Sarasota, 117 So.2d

731 (Fla.1960); Fla.Const., Article V, s 3(b)(3).

Further conflict is demonstrated with City of Miami Beach v. Royal Castle System, Inc., 126 So.2d 595, 597 (Fla.App.3d 1961) holding a Board of Adjustment for the City to be bound by the 'ordinary and usual meaning of the term' in the statute unless differently defined in its own provision and applying a reasonable dictionary definition.[FN2]

FN2. Godson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942); and Southern Bell Telephone and Telegraph Co. v. D'Alemberte, 39 Fla. 25, 21 So. 570 (1897).

The opinion under review, like the trial court's ruling, applied statutory construction which is in conflict with established principles in the decisional law of Florida in at least the following respects:

(a) In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words.[FN3]

FN3. Rose v. Town of Hillsboro Beach, 216 So.2d 258 (Fla.App.4th 1968); Brooks v. Anastasia Mosquito Control Dist., 148 So.2d 64 (Fla.App.1st 1963); Maryland Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 679 (1936); Marion County Hospital District v. Namer, 225 So.2d 442 (Fla.App.1st 1969), citing Maryland Casualty, Supra; Godson v. Town of Surside, 150 Fla. 614, 8 So.2d 497 (Fla.1942); Gay v. City of Coral Gables, 47 So.2d 529 (Fla.1950); Union Trust Co. v. Lucas, 125 So.2d 582 (Fla.App.2d 1960); and State ex rel. Lacedonia v. Harvey, 68 So.2d 817 (Fla.1953).

(b) Statutes or ordinances should be given that interpretation which renders the ordinance valid and constitutional.[FN4]

FN4. Owen v. Cheney, 238 So.2d 650 (Fla.App.2d 1970); Rotenberg v. City of Fort Pierce, 202 So.2d 782 (Fla.App.4th 1967); City of Eau Gallie v. Holland, 98 So.2d 786 (Fla.1957).

(c) Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner.[FN5]

FN5. See footnote 3.

[2][3] Municipal ordinances are subject to the same rules of construction as are state statutes. Rose v. Town of Hillsboro Beach, 216 So.2d 258 (Fla.App.4th 1968); Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885 (Fla. 1890). Rose also stands for the substantive proposition that courts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent, and must give to a statute (or ordinance) *554 the plain and ordinary meaning of the words employed by the legislative body (here the City Council). Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla.App.1st 1963).

[4][5] In Maryland Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 679 (1936), dealing with judicial construction of the Workmen's Compensation Act, the Court states the first rule of statutory construction in a like manner:

> 'The legislative history of an act is important to courts Only when there is doubt as to what is meant by the language employed.' (Emphasis added.)

Where words used in an act, when considered in their ordinary and grammatical sense, clearly express the legislative intent, other rules of construction and interpretation are unnecessary and unwarranted. The intent of the North Miami City Commission in its enactment of the zoning ordinance in issue is to be determined primarily from the language of the ordinance itself and not from conjecture Aliunde. A statute or ordinance must be given its plain and obvious meaning. See Marion County Hospital District v. Namer, 225 So.2d 442 (Fla.App.1st 1969), citing Maryland Casualty, Supra.

This Court in Gay v. City of Coral Gables, 47 So.2d 529 (Fla.1950), stated the rule that must be followed in determining intent of an ordinance:

> 'When the legislative intent is clear from words used in the enactment, courts are bound thereby

and may not seek a meaning different from ordinary or common usage connotation of such words unless, upon a consideration of the act as a whole and the subject matter to which it relates, the court is necessarily led to a determination that the legislature intended a different meaning to be ascribed to the language adopted by it.'

Petitioner's property is within the principal industrial area of the City of North Miami, bound on all sides by industrial plants such as the Panelfab Manufacturing Plant and the Lehigh Concrete Batching Plant, and is within the last undeveloped part of this industrially zoned area which is not developed.

The fact that another company has a concrete batching plant already in operation right across the street from petitioner's proposed site is not mentioned below.

The only non-industrial use in the area is really one which has recently intruded into the previously heavily industrialized neighborhood. This is property of the principal objector who erected apartment buildings in a portion of this industrial center which was expressly rezoned from its previous industrial zoning classification to one for multiple family residential use, and thereupon this objector and developer proceeded to erect his apartment houses there.

Petitioner made its purchase in 1970 after a meticulous search for an appropriate site location which was compatible with its spacing of concrete batching plants to serve the needs of the areas served by the petitioner. The then officials of the City of North Miami Beach were expressly asked whether the intended use of the concrete batching plant by petitioner met the zoning requirements and gave an affirmative response which led to petitioner's purchase; only to have petitioner learn upon a change of administration that it was to be denied the building permit, the very purpose for which it had made the purchase. We do not hold that such inquiry gave petitioner a vested guarantee in the issuance of its permit, for times and conditions change. But it does reflect petitioner's good faith and reliance; it also shows what the true 'intent' of the legislative body in question was as to the zoning use intended for the area, which is the principal point raised by petitioner as being violated *555 by the 'interpretation' of the ordinance to arrive at a contrary intent.

[6] The ordinance in question is s 29--42 of the City's zoning code setting forth the uses permitted in the zone in question, namely 'industrial zoning district 3—A'. (Ordinance 380.244) The code proceeds to set forth specifically 43 delineated zoning usages which cover the gamut of typical industrial use from 'automobile wreckage service, storage yards . . .', blacksmith shops, storage of gasoline, dredging machinery storage areas, fertilizer sales, power or steam laundries, stone cutting, welding, leather goods manufacture, and the category under which petitioner claims to fall:

'(29) Contractor's plants and/or storage yards, providing the area used is enclosed by a building or by a wall not less than 6 feet in height.'

Application of the maxim Expressio unius est exclusio alterius would demonstrate the consistency of petitioner's use with that of the 42 other uses set forth in this industrial grouping.

The doctrine of Noscitur a sociis will similarly apply in not excluding the 'batching' or mixing of ingredients for ready mix concrete in truck cylinders, from the type of products otherwise set forth in the ordinance. Carraway v. Armour and Co., 156 So.2d 494, 495 (Fla.1963); and Rose v. Town of Hillboro Beach, Supra.

Petitioner seeks to install his 'contractor's plant and storage yard' for a concrete mixing or 'batching' plant where the ingredients of sand, rock and portland cement mix are 'batched' into the revolving turrets of the typical concrete delivery truck which proceeds to the job while these ingredients are mixed as the turret (or drum) turns during the trip to its destination. The plant area is fully paved with a built-in wash down system; the aggregate is stored in enclosed silos and carried by an enclosed conveyor system, the entire operation being automated and enclosed.

There is no manufacture of heavy cement products. This is significant because the principal contention of the City and of the holdings below is that when Ordinance 380.244 was adopted in 1966, it deleted a phrase 'cement products such as concrete blocks, pipe, etc.'

The reasoning of the zoning director which is the basis for the rulings below, is that this quoted deletion meant that, 'it also eliminated the manufacture of concrete as a permitted use.' This is, of course, an interpretation completely at odds with the approval of a competitive 'cement batching plant' already in operation across the street. The director put it that in his view 'concrete was a product of Cement and it made no difference in his opinion in what form it set up in.' Of course concrete is the 'set

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up' or end result of a 'cement' mixture. The exception in the deletion from the ordinance which was pointed to by the director as direction for the intended meaning of the permitted use, only included Cement products 'SUCH AS concrete, pipe, etc.' and there are no products, particularly no 'such as' products involved in petitioner's use, nor contained in the permitted uses for a 'contractor's plant and storage yard' in item 29. To inject such additional meaning into such words violates the statutory interpretation earlier pointed out in this opinion as the basis for conflict.

The distinction between 'cement' and 'concrete' is clear. The dictionary definitions of the two words draws the distinction: 'Cement' is 'a substance used in a soft state to join stones in building, to cover floors, etc., and which afterwards becomes hard like stone; any substance used for making bodies adhere to each other . . .'. On the other hand, 'concrete' is defined as: 'A concrete form or Object . . .; a mass formed by concretion or coalescence of separate particles of matter in one body; artificial stone made by *556 Mixing cement and sand with gravel, broken stone, or other aggregate.' [FN6]

FN6. Webster's Dictionary, Fifth Edition.

This distinction between the two substances was apparently overlooked by the zoning director and City and may have been the cause of the fallacious reasoning that the deletion from item 29 of 'concrete pipe, etc.' was also a delection of 'cement' which, of course, is not the case.

As we understand the district court's reasoning, it founded its decision upon the fact that the language in the ordinance, 'contractor's plants and/or storage yards' is not explicit enough to include a 'concrete batching plant' which is this contractor's business, within the meaning of that language. The district court opinion does not suggest what the statutory 'contractor's plants and/or storage yards' might mean, but simply stated that whatever it means, a concrete batching plant is not included in that meaning. The trouble with this position is that it leads to one of two contradictory results:

(1) either the permitted item 29 'contractor's plants . . .' is meaningless because it does not specify a particular type of contractor as to Any type of plant within the general industrial purport of the 43 items of industrial uses (since any contractor at all would meet with the same difficulty in that his particular business was not specified); or

(2) item 29 as to 'contractor's plants . . .' is open to whatever determination the zoning director and City of North Miami might from time to time choose to give to it, resulting in an arbitrary discretion and an inevitable resort to the courts in each instance. Such an unconstitutional result is not permitted where such contractors are not given equal treatment. The present case bears this out wherein it is clear from the record that the City has permitted all sorts of contractor's plants, some of which are identical and others of which are heavier industrial usage in the same area, one even being a Lehigh Concrete Batching Plant, yet has rejected the petitioner's batching plant.

The legislative intent with regard to item 29 in particular is clarified in the record from the statements of the City Council members who passed the ordinance and eliminated from number 29 any 'cement products such as concrete blocks, pipe, ect.'. One Commissioner and former Mayor stated:

> 'This action was directed at the Florida Litho-Bar Manufacturing Plant which manufactured pre-stressed concrete beams; culvert pipe; blocks and so forth. It was not a ready-mix batching plant. It was very noisy, very unsightly and was expanding even beyond the large size it had.
> 'The action of the Council in eliminating the manufacture of cement products such as 'concrete blocks, pipe, etc.' in no way was meant to include elimination of the contractors plant and storage yard such as a cement batching plant where cement and aggregates are stored in silos; mixed together and placed in trucks for delivery to job sites.'

Seldom do we have such evidence of the clear legislative intent of the change (deletion) upon which to rely and it should not be ignored.

The petition for certiorari is accordingly granted; the opinion of the district court is quashed with directions that the order of the circuit court denying relief be set aside and an order entered directing that the City of North Miami forthwith issue the building permit sought by petitioner.

It is so ordered.

CARLTON, C.J., and ROBERTS, ERVIN, ADKINS and DEKLE, JJ., concur.

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327 So.2d 784.
(Cite as: 327 So.2d 784)

District Court of Appeal of Florida, Third District.

Harold R. GARCIA, Representative father and next friend of Elsa Garcia, a minor, Appellant,
v.
ALLSTATE INSURANCE COMPANY, a Foreign Corporation, Appellee.

No. 75–508.

Jan. 20, 1976.
Rehearing Denied March 23, 1976.

Plaintiff, as representative father and next friend of minor daughter, sought declaration that he was entitled to uninsured motorist coverage in the same limits as his bodily injury liability coverage. The Circuit Court for Dade County, Thomas E. Lee, J., dismissed complaint, and plaintiff appealed. The District Court of Appeal, Nathan, J., held that order granting defendant's motion to dismiss the complaint for declaratory relief was to be treated as a declaratory judgment and that uninsured motorist coverage is not required to be written in same amounts as the bodily injury liability but may be written in any amount between such coverage and the minimum financial responsibility limits.

Affirmed.

West Headnotes

[1] Declaratory Judgment ⇨254
118Ak254 Most Cited Cases

Trial court's order dismissing complaint on ground that the amended declaratory judgment action failed to state a cause of action since face of complaint showed that uninsured motorist coverage was not less than that required by financial responsibility law was treated as declaratory judgment; even though court's interpretation was adverse to plaintiff it was nevertheless a declaration of rights. West's F.S.A. § 86.011.

[2] Insurance ⇨2795
217k2795 Most Cited Cases
(Formerly 217k531.3(1), 217k467.51)

Uninsured motorist coverage is not required to be written in same amounts as bodily injury liability; uninsured motorist coverage may be written for any amount between the financial responsibility limits and the bodily injury liability coverage. West's F.S.A. § 627.727.

*785 Robyn Greene, Luis Stabinski and Norman Funt, Miami, for appellant.

Spencer & Taylor, Miami, for appellee.

Before BARKDULL, C.J., and PEARSON and NATHAN, JJ.

NATHAN, Judge.

Plaintiff, Harold R. Garcia, representative father and next friend of Elsa Garcia, a minor, appeals from an order dismissing his complaint against defendant Allstate Insurance Company for failure to state a cause of action.

Garcia filed a complaint for a declaratory decree alleging that he had uninsured motorist coverage with Allstate, that an uninsured motorist struck his daughter, that Allstate maintains that Garcia's uninsured motorist coverage is $10,000/$20,000 on each of his two automobiles and that Allstate offered $20,000 in settlement, which is what it claims to be the policy limit. Garcia sought to have the court determine that by virtue of Chapter 71–88, Laws of Florida, he is entitled to uninsured motorist coverage in the same limits as his bodily injury liability coverage, $100,000/$300,000 on each of his two automobiles, or a total of $200,000/$600,000. Allstate filed a motion to dismiss for failure to state a cause of action. Following a hearing, the trial court entered an order dismissing the complaint on grounds that,

> '. . . said Amended Declaratory Action fails to state a cause of action and the face of the plaintiffs' Complaint showing that the insurance policy providing uninsured motorist limits of . . . $10,000 per person and . . . $20,000 per accident is not less than the requirements of the Florida Financial Responsibility Law and is in an amount up to the amount of the liability limits shown thereon and the face of the plaintiffs' Amended Declaratory Action does thereby show that the referred to insurance policy is in full compliance with F.S. 627.727 as amended by Chapter 71–88, Laws of Florida; and no justiciable controversy therefore exists . . .'

On appeal, Garcia contends that (1) the trial court

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(Cite as: 327 So.2d 784)

erred in dismissing the action without giving him a declaration of the amount of his uninsured motorist coverage, and (2) since he never rejected any portion of his uninsured motorist coverage, he was entitled to uninsured motorist coverage in the amount of his bodily injury liability coverage under Chapter 71--88, Laws of Florida.

[1] As to Garcia's first point, we treat the order granting Allstate's motion to dismiss the complaint for declaratory relief as a declaratory judgment under s 86.011, Fla.Stat. In its order of dismissal, as recited above, the trial court did make a declaration of the rights of the parties. Even *786 though the court's interpretation is adverse to the plaintiff it is nevertheless a declaration of rights. See Gates v. City of Jacksonville, Fla.App.1973, 278 So.2d 645.

[2] As to the second point, we are of the opinion that Chapter 71--88 simply added a maximum limitation in uninsured coverage. Previously, the statute (s 627.0851, Fla.Stat., 1969) required limits 'not less than' the financial responsibility limits and was silent as to the limits that could be provided in excess of the financial responsibility limits. Then, Chapter 71--88 added 'and in an amount up to' the liability limits (s 627.727, Fla.Stat., 1971), and inserted maximum limitation. Any coverage inbetween the financial responsibility limits and the liability is in full compliance with the statute.

> 'In the interpretation of statutes, a court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty.' 73 Am.Jur.2d, Statutes, s 269.

Affirmed.

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